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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No.

WILLMUT GAS & OIL COMPANY, ET AL.,
Appellants,

vs.

COVINGTON COUNTY, MISSISSIPPI, ET AL.,
Appellees

STATEMENT AS TO JURISDICTION

Pursuant to Paragraph 2 of Rule 13, there is in accordance with Rule 15 respectfully submitted to this Court this jurisdictional statement.

Opinion Below

This Cause is not as yet officially reported. Unofficially, it is reported in 71 So. (2d) 184. No opinion was delivered when Suggestion of Error overruled June 14, 1954, — So. (2d) —. See Appendix "A" hereto therefor; likewise, Appendix "B" for the judgment rendered by the Supreme Court of Mississippi March 15, 1954, and judgment overruled, Suggestion of Error, June 14, 1954, Appendix "C".

Jurisdiction

Parties Appellant. Willmut Gas & Oil Company, and Ohio Casualty Company of Hamilton, Ohio, surety, upon

its appeal bond, appellants (hereinafter called "Willmut"). County of Covington, appellee, United Gas Pipe Line Company (hereinafter called "United") not appealing.

This appeal is taken pursuant to Title 28 *U. S. C.*, Sec. 1257(2), appellants claiming (a) contract impairment contrary to the Contract Clause, Art. I, Sec. X, of the Constitution; (b) deprivation of property without due process, contrary to the Fourteenth Amendment, the predicate of appellants' contract and property rights being a conveyance to Malachia Odom from Mississippi based upon (1) Ch. 9, Art. 12, Secs. 1 and 2, February 27, 1833, *Hutchinson's Code*, which in part provides:

> "* * * and it shall be the duty of said trustees on the final payment of the money which may be due and not before, to convey title, right, use, interest and occupation of said sections, or any such parts as may be leased to the lessee or lessees, for and during, and until the full end and term of ninety-nine years."

(2), Ch. 9, Art. 24, p. 221 January 20, 1841, *Hutchinson's Code*, which provides:

> "An Act to Amend the Law as to Leases of the Sixteenth Sections—Jan. 20, 1841.
>
> "The lessees of sixteenth sections, and all other school lands, shall be authorized to, and may maintain and carry on, all such suits at law or in equity, immediately after the leasing, as they could or might maintain, or carry on were they the fee-simple owners of the leased premises, except as against the lessors."

and (3), potential power to convey in fee.

Compare *Burkley* v. *Jefferson County*, 213 Miss. 836, 58 So. (2d) 22, 26, whereunder appellent received an estate free from rent, expiring March 2, 1945, and constituting a contract, which was impaired by Section 2780, *Mississippi*

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Code of 1942, initially enacted Ch. 291, Laws of 1922, but presently in the following form:

> "All companies or associations of persons, incorporated or organized, for the purpose of building or constructing pipe lines and appliances for the conveying and distribution of oil or gas or for the purpose of constructing, maintaining and operating lines for transmitting electricity for lighting, heating and power purposes, are hereby empowered to exercise the right of eminent domain in the manner now provided by law, and to build and construct the said pipe lines and appliances along or across highways, waters, railroads, canals and public lands, above or below grounds, but not in a manner to be dangerous to persons or property, nor to interfere with the common use of such roads, waters, railroads, canals and public lands. *The board of supervisors of any county through which any such line may pass, shall have the power to regulate*, within their respective limits, the manner in which such lines and appliances shall be constructed and maintained on and above the highways and bridges of the county and all such companies or associations shall be responsible in damages for any injuries *caused by such construction or use thereof.*" (Emphasis ours)

whereunder in this Cause Mississippi's Supreme Court, being the highest court where such question might be determined, adjudged that said contract had been by said statute pursuant to the Constitution of Mississippi, Sections 95 and 211, transformed into a revokable estate, terminable before March 2, 1945, and for the enjoyment of which by said statute Mississippi had imposed a rental charge for the use, predicated upon the estate by Willmut enjoyed, the Supreme Court sustaining the validity of said Section 2780, *Mississippi Code of 1942*, and denying appellents' contention (a) as to contract, and (b) as to rent, notwithstanding that the State of Mississippi was appellant's remote grantor

and the obligation in said contract—the obligation of the state—and the impairment a benefit claimed on behalf of the state through its agency, Covington County. Compare *Perry* v. *U. S.*, 294 U. S. 330, 79 L. ed. 912; and *Norman* v. *Baltimore & O. R. Co.*, 294 U. S. 240, 79 L. ed. 885.

Further, said Court denied appellent's claim under the Fourteenth Amendment as to deprivation by said statute of the property without due process of law. Furthermore, in said Cause, jurisdiction of this Court is likewise conferred by Section 1257(2). If not, then by Section 1257(3), hereinafter set up in Question II and Question III, appellant invoking its right under the section granted its appeal to have determined, if essential, said questions II and III by certiorari, wherefor pursuant to statute this is made a petition because appellant specifically claims its contract and rights of property under the statutes of the State of Mississippi as hereinabove set forth and made such claim pursuant to the Constitution of the United States, both (a) the Contract Clause, and (b) the Fourteenth Amendment (compare 28 *U. S. C.*, Sec. 2103), and the Supreme Court of the State of Mississippi, being the highest court, as aforesaid, wrongfully denied the same.

Further, appellant claimed that the United States and not the state of Georgia was the donor of this Sixteenth section land in accordance with the opinion of *Hester* v. *Crisler*, 36 Miss. 681, and the statutes and treaties therein construed, and its claims thereunder were denied, and the title held as having originated from the State of Georgia (*Jones* v. *Madison County*, 72 Miss. 777, 18 So. 87; *Pilgrim* v. *Neshoba County*, 206 Miss. 703, 40 So. (2d) 598, 600; and *Lambert* v. *State*, 211 Miss 129, 51 So. (2d) 201).

Notice of appeal was filed with this Honorable Court on the 3rd day of September, 1954, and likewise with the Su-

preme Court of the State of Mississippi on the 2nd day of September, 1954.

Cases believed to sustain the jurisdiction are: *Home Bldg. & Loan* v. *Blaisdell*, 290 U. S. 398, 78 L. ed. 413; *Perry* v. *U. S.*, 294 U. S. 330, 79 L. ed. 912; *Stone* v. *Reichman-Crosby*, 339 U. S. 917, 94 L. ed. 1342; *Y & MV RR. Co.* v. *Adams*, 180 U. S. 1, 45 L. ed. 395 and *May* v. *Anderson*, 345 U. S. 528, 97 L. ed. 1221.

The provisions of the statutes are as hereinabove given, not reiterated to save prolixity.

The questions presented are as given in the Notice of Appeal, thus:

I. Appellant, a public utility (and after August 20, 1943, its warrantee, United Gas Pipe Line Company, herein called "United", likewise a public utility) was in possession of gas pipe lines over public lands under title originating in 1846 wherefor full value was paid for a conveyance of title, right, use, interest and occupation until March 2, 1945. Their estate therein was (a) irrevocable until March 2, 1945, and (b) freed and acquitted of all rent until the same date, this having been commuted by the initial cash payment (Ch. 9, Art. 12, Sections 1 and 2, p. 213, Feb. 27, 1833, and Ch. 9, Art. 24, p. 224, Jan. 20, 1841, *Hutchinson's Mississippi Code*, 1798-1848). Thereupon, Mississippi's Legislature enacted Section 2780, *Mississippi Code of 1942*, originating in Chapter 291, Laws of 1922 (hereinafter referred to as "Section 2780"), whereunder similar utilities were given across public lands (a) a revocable easement and (b) were compelled to "pay a consideration, either at one time or in installments of rent, for their right-of-way" (*Willmut Gas & Oil Co.* v. *Covington County*, 71 So. 2d 184, 191), in virtue of *Mississippi Constitution* 1890, Sections 95 and 211. Appellant says (a) under the Contract Clause, and (b) under the Due Process Clause, that being seized of an irrevocable

estate, rent free, until March 2, 1945, they may not be compelled to and did not accept in lieu thereof an estate (a) revocable at pleasure after February 20, 1934, until March 2, 1945, and (b) carrying an obligation to pay an additional rent, reasonable in amount, notwithstanding the initial commutation and payment in full. In short, Mississippi may not confiscate from appellant an indefeasible estate, terminable at March 2, 1945, and rent free, and coerce appellant and its surety by this statute legislatively to accept (a) a revocable estate, and (b) to pay the rental as by this judgment awarded.

II. Appellant and United, public utilities as aforesaid, held possession of this right of way from 1934 until date, and appellant claims under the Due Process Clause that (a) Mississippi's Supreme Court had held such occupation, under substantially similar easements to Section 2780, to be rent free (*Meridian* v. *Western Union Telegraph Co.*, 72 Miss. 910, 18 So. 84, 29 L. R. A. 770; *Village of Ridgeland* v. *Madison County*, 154 Miss. 613, 122 So. 753; and *Canton* v. *Cotton Warehouse Company*, 84 Miss. 268, 36 So. 266); and (b) the Attorney General of the State of Mississippi specifically ruled that under Section 2780 there was a right of occupancy by the utilities in return for the public service rendered and no rental was due for such use. No other agency of the State of Mississippi had ever made, generally, and especially not upon appellant or United, any such demand for such rental as has been imposed by this opinion in virtue of Section 2780, which in part provides:

> "* * * The board of supervisors of any county through which any such line may pass, shall have the power to regulate, within their respective limits, the manner in which such lines and appliances shall be constructed and maintained on and above the highways and bridges of the county and all such companies or

associations shall be responsible in damages for any injuries caused by such construction or use thereof."

But, unexpectedly, and, with deference, without due predicate therefor, Mississippi's Supreme Court in this case held March 15, 1954, that to conform to Sections 95 and 211 of *Mississippi's Constitution*, these utilities had to pay a reasonable rental for such user extending back substantially to 1890 when Mississippi's Constitution was adopted, and the Legislature, notwithstanding the continuous usage contra, could not create such a right of way without thereby "donating land". Since such reasonable rental was an inherent integral element of cost, these utilities had a right to pass and were obligated to pass such cost to the customers using the gas at that particular time, and would have so passed had Mississippi made due demand therefor. Mississippi cannot, by having thus deprived appellant and its warrantee, United, of this right to collect from their customers, now, beginning as at 1934 as to appellant, collect the enormous amounts that would thus appertain and whereasto appellant would be, through Mississippi's act in not demanding rental earlier, substantially wrecked in their operations and their utility functions substantially confiscated (*City of Tulsa* v. *Southwestern Bell Tel. Co.*, 75 Fed. 2d 343, collecting cases).

III. Mississippi's title to these Sixteenth Sections came from the United States (*Hester* v. *Crisler*, 36 Miss. 681), and not from Georgia (*Jones* v. *Madison County*, 72 Miss. 777, 18 So. 87). Compare, also, *Pilgrim* v. *Neshoba County*, 206 Miss. 703, 40 So. (2d) 598, and *Lambert* v. *State*, 211 Miss. 129, 51 So. (2d) 201.

As to Questions II and III, it is respectfully requested that, being irrevocably joined with the question whereasto an appeal may be, they should be likewise herein so considered, though, if alone, certiorari would be requisite; and

prayer for certiorari respectfully is hereby made, if essential. Compare 28 U.S.C., Section 2103, and *May* v. *Anderson*, 345 U. S. 528, 97 L. Ed. 1221.

Concise Statement of the Case, Containing the Facts Material to the Consideration of the Questions Presented:

A. The land, whereasto this controversy is, is public land —Sixteenth Section school land, donated to Mississippi. The State of Mississippi, through a duly authorized instrumentality, conveyed to Malachia Odom Section 16, Township 6 North, Range 14 West, Covington County, Mississippi, wherein the words of grant were:

> "This indenture made and entered into this 3rd day of March A. D. 1846 by and between the president and members of the Board of Police of Covington County, Mississippi, and Malachia Odom of said county and state aforesaid, Witnesseth, that for and in consideration of the sum of Three hundred and thirty-five dollars and thirty two cents by the said Malachia Odom party of the second part paid to the parties of the first part. . . . and the said Malachia Odom released from any further payment thereon, they the said parties of the first part as trustees as aforesaid have given, granted, bargained and sold unto him the said Malachia Odom, party of the second part, and do hereby grant, bargain, sell, convey and confirm unto him the said Malachia Odom, his heirs and assigns for the full term of ninety nine years from the 3rd. day of March A. D. 1846, . . . and the said parties of the first part . . . do warrant and will forever defend all the right, title and estate in said lands and tenements as aforesaid unto the said Malachia Odom his heirs and assigns for the term aforesaid."

By Chapter 42, Art. 1, Sec. 32, Hutchinson's Mississippi Code, this warranty vouchsafed "*Quiet enjoyment*". The statute appears as Appendix "D".

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By mesne conveyances of record, the Odom title was conveyed to Public Service Corporation of Mississippi, which thereon constructed an eight-inch gas pipe line which has been operated as a public utility continuously since (*Gandy* v. *Public Service Corporation of Mississippi*, 163 Miss. 187, 140 So. 687.) No objection thereto was made by the State of Mississippi or any of its agencies, and especially no demand made for rent, until the bringing of this suit. Upon foreclosure of a mortgage in the Federal Court, Willmut purchased the pipe line on the 20th day of February, 1934, and operated it as such until the 20th day of August, 1943, when, under a Certificate of Convenience and Necessity, issued by the Federal Power Commission, it was sold to United, which has operated it continuously since and now so does as an integrated part of its system.

B. Until March 2, 1945, appellant and United in turn claimed by contract exclusive ownership, subject to a right of reverter, under the Odom deed and therewith no interference was until this suit was brought. Compare *Gulf Refining Company* v. *Terry*, 163 Miss. 869, 142 So. 457, under which, as construed by the state Supreme Court, the lessee has an exclusive right of possession thus:

> "3. Public lands. Lease, executed by school trustees of township in 1846, vested in lessee and his successors in interest every right which statute under which it was executed authorized trustees to convey (Act of February 27, 1833).
>
> "Public lands. Lease executed by school trustees of township in 1846 conveyed to lessee right to exclusive possession and occupation of every part of 'land.'
>
> "Term 'land' includes, not only surface of soil, but everything under it and above it, unless it appears from instrument in which it was used that parties thereto intended for it to have a more restricted meaning."

Compare, also, *Pace* v. *State*, 191 Miss. 780, 4 So. 2d 270, wherein this right was expressly recognized, but by a divided court it was held that the state having retained the minerals might obtain the same through reasonable development, but paying therefor withal to the lessee due compensation. Compare Syl. 1, reading thus:

> "Holders of 99-year agricultural leases on sixteenth section land are entitled to compensation for any damage that may be sustained to their surface rights in the course of exploration or development of such land for production of oil and gas, but since the amount of such damage cannot be properly ascertained in advance of and as a condition precedent to the right of entry upon the premises, surface lessees may be remitted to their action at law for damages at such time as the amount thereof can be ascertained with such reasonable certainty as to fairly compensate them."

Compare, also, *Dantzler Lumber Company* v. *State*, 97 Miss. 355, 53 So. 1, in which the state as reversioner was without power to sell thereon any timber or wood without the express consent of the lessee, who hereasto was given such a right as that the state could not impair (being mindful of *State* v. *Dear*, 212 M. 620, 55 So (2d) 370.

The predicate of appellant's title was:

(1) Ch. 9, Art 12, Sections 1 and 2, Feb. 27, 1833, *Hutchinson's Mississippi Code*, 1798-1848.

(2) Ch. 9, Art. 24, Jan. 20, 1841, *Hutchinson's Mississippi Code*, p. 221.

(3) In *Jones* v. *State*, 202 Miss. 705, 32 So. (2d) 435, there was presumed the power in the state agencies to convey in fee simple when grantee claimed adversely under an absolute grant. Compare *Creekmore* v. *Neshoba County*, 216 Miss. 589, 63 So. 2d 46; *Barkley* v. *Jefferson County*, 213 Miss. 836, 58 So. (2d) 22, 26; *Foster* v. *Jefferson County*,

202 Miss. 629, 32 So. (2d) 126; and *Street* v. *Columbus*, 75 Miss. 822, 23 So. 773. The state's contract was assumed to be abrogated by the state in its own favor. Compare *Perry* v. *United States*, 294 U. S. 330, 79 L. ed. 912, wherein Syl. 2 reads as follows:

> "2. The Joint Resolution of Congress of June 5, 1933, declaring provisions requiring payment in gold or a particular kind of coin or currency to be against public policy, and providing that obligations containing such a provision shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public or private debts goes beyond the powers of Congress so far as it applies to the obligations of the United States."

and Congress was not subject to the Contract Clause.

(4) Operation of a pipe line has been clearly recognized as an instance of such an ownership. *Bernard* v. *Board of Supervisors of Jackson County*. 216 Miss. 387, 62 So. (2d) 576, wherein it was said, p. 583:

> "* * * The statute does not limit the use to agricultural purposes only. The lessee may use the land for any purpose. He may build a home or a factory on it. Many towns and cities in Mississippi are built on sixteenth section lands which are under ninety-nine year leases. On these lands are found residences, mercantile establishments, filling stations, power plants and factories of various kinds, with not one square foot of an entire section being devoted to agricultural purposes."

See, also, *Gulf Refining Company* v. *Terry;* and *Pace* v. *State, supra.*

We here reassert Point I, *supra*, reading:

I. Appellant, a public utility (and after August 20, 1943, its warrantee, United Gas Pipe Line Company, herein called

"United", likewise a public utility) was in possession of gas pipe lines over public lands under title originating in 1846 wherefor full value was paid for a conveyance of title, right, use, interest and occupation until March 2, 1945. Their estate therein was (a) irrevocable until March 2, 1945, and (b) freed and acquitted of all rent until the same date, this having been commuted by the initial cash payment (Ch. 9, Art. 12, Sections 1 and 2, p. 213, Feb. 27, 1833, and Ch. 9, Art. 24, p. 221, Jan. 20, 1841, *Hutchinson's Mississippi Code*, 1798-1848). Thereupon, Mississippi's Legislature enacted Section 2780, *Mississippi Code of 1942*, originating in Chapter 291, *Laws of 1922* (hereinafter referred to as "Section 2780"), whereunder similar utilities were given across public lands (a) a revocable easement and (b) were compelled to "pay a consideration, either at one time or in installments of rent, for their right-of-way" (*Willmut Gas & Oil Co.* v. *Covington County*, 71 So. 2d 184, 191), in virtue of *Mississippi's Constitution* 1890, Sections 95 and 211. Appellant says (a) under the Contract Clause, and (b) under the Due Process Clause, that being seized of an irrevocable estate, rent free, until March 2, 1945, they may not be compelled to and did not accept in lieu thereof an estate (a) revocable at pleasure after February 20, 1934, until March 2, 1945, and (b) carrying an obligation to pay an additional rent, reasonable in amount, notwithstanding the initial commutation and payment in full. In short, Mississippi may not confiscate from appellant an indefeasible estate, terminable at March 2, 1945, and rent free, and coerce appellant and its surety by this statute legislatively to accept (a) a revocable estate, and (b) to pay the rental as by this judgment awarded.

The seriousness of that done by the decision and the neces-

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sity for rectification is best stated by Justices of Mississippi's courts thus:

A. In the opinion of Mr. Justice Roberds, as to the necessity for full argument with rectification under the Constitution, note 71 So. 2d 191, thus:

> "* * * The result of this decision, in my view, will create chaos and utter confusion in this State. All of these utilities acted upon Section 2780 and like statutes in construction of railroads, telegraph, telephone and power lines and in the laying of gas and oil lines. None of the statutes expressly require payment of rent to the State for an easement over public lands. Indeed, Section 5525, Mississippi Code 1942, conferring power upon REA to construct electric power lines across public lands, expressly provides this may be done 'without payment to the State for said easement.' The other statutes, in effect, do the same thing by not expressly requiring money payment for such right. No utility paid such money rent. The records disclose that the State now owns approximately 710,000 acres of school and lieu lands and 950,000 acres of other public lands, a total of over one and a half million acres of public lands. When many of the utility lines were constructed the State owned considerably more than the stated amount of non-school lands. These public service lines, both above and under ground, *now traverse these public lands in thousands of instances.* A number of the municipalities of the State, such as Natchez and Columbus, for illustration, are located upon sixteenth section lands. The utility lines are constructed on the streets and across parks throughout these municipalities. If appellant must pay annual rent in the case at bar, it is not seen why such rent cannot be collected from all of these utilities for easements over public lands back to 1890. Suits to do just that will be innumerable, unless the legislature has the power, and exercises it, to prevent such suits from being prosecuted." (Emphasis ours)

B. Compare, likewise, dissenting opinion, Smith, Chief Justice, in *Pace* v. *State*, 191 Miss. 780, 4 So. (2d) 270, 281:

"The history of this Court's dealing with the rights of the State and its lessees under these ninety-nine year leases of sixteenth section land is quite interesting. Until the decision in Warren County v. Gans, 80 Miss. 76 31 So. 539, more than sixty years after the State began to make these leases, no question was raised as to the right of the lessees to do what they pleased with the land, for, as was said by Judge Calhoon in the case of Moss Point Lumber Company v. Harrison County, 89 Miss. 448, 42 So. 290, 294, 873, 'by universal understanding the lessee for 99 years of sixteenth-section lands acquired all of the rights of an owner in fee for the time'. In the Gans case, supra, the Court said this understanding of the rights of these lessees was wrong, and they were liable for the commission of waste, there the sale for commercial purposes of timber from the land. Four years after that case was decided, and the personnel of the Court had changed, the Court held in Moss Point Lumber Company v. Harrison County, supra, that this universal understanding was correct, and the lessee of the land during the ninety-nine year period could deal with the land as the owner thereof except that at the end of that period the land reverted to the State. The Court was then composed of three Judges, one of whom dissented from the decision then rendered. The term of one of the two Judges who decided the case expired while a suggestion of error was pending therein. The Judge appointed to succeed him agreed with the Judge who dissented on the original hearing. The suggestion of error was then sustained and the Court returned to the ruling of the Gans case, holding that while the lessees had the right to the exclusive possession and occupancy of the land, they were mere tenants thereof without the right to commit waste thereon. This holding was adhered to in many decisions, including Gulf Refining Company v. Terry, supra, in which case it is held that the State is without

the right to interfere with the possession and occupancy of the lessee of a sixteenth section, holding under a lease of the character here in question, by entering it and boring for oil or gas that might be therein. That case, like the Moss Point Lumber Company case, supra, was decided by a divided Court, and since it was decided, the personnel of the Court has again changed, resulting in a majority of the Judges now saying that it was wrongly decided and should be overruled. If the past is any forecast of the future, it seems safe to predict that when the personnel of this Court again changes, it will run true to form and overrule the decision just rendered."

C. In *Moss Point Lumber Company* v. *Harrison County*, 89 Miss. 448, 42 So. 290, Judge Calhoon dissented thus:

"My view is that the majority opinion is in violation of the contract clauses of both state and federal constitutions. The purchaser here bought the lease:

"(1) In the light of the interpretation by the public understanding and usage of seventy years.

"(2) In the light of Davany v. Koon, 45 Miss., 71, holding these leases to be sales for the term.

"(3) In the light of Bond v. Griffin, 74 Miss., 599 s.c. 22 South., 187), holding, in a lease the same as this, that the lessee owned the timber, and could himself and for himself recover its value from a trespasser.

"(4) In the light of State v. Fitzgerald, 76 Miss., 502 (s.c., 24 South, 872), holding that the purchaser from the lessee could bring replevin for the timber removed from the land.

"(5) In the light of the very terms of the authorized lease in the act of 1883.

"(6) In the light of Revised Code 1880, Sec. 494, taxing the lessee the value of the land, under which code this lease was made (secs. 732-735).

"(7) And in the light of the other matters set forth in the original and concurring opinions in this case, and in my dissent from the last announcement.

"Under these circumstances the purchaser should be protected by every rule of right and every decision on the subject."

The writer was of counsel in each of these cases and that said by the Justices of Mississippi's Court, with deference, is true and accurate.

After the decision in the case of *Warren County* v. *Gans*, 80 Miss. 76, 31 So. 539, the state Supreme Court sustained the absolute right of the lessees in the cases of *Adams* v. *Enon Lumber Co.*, 37 So. 1023, and *Adams* v. *Griffin*, 85 Miss. 1, 37 So. 457.

D. Under Section 104 of *Mississippi's Constitution*, no limitation runs against the State and Mississippi's court coerced payment as to these utilities beginning 1934, and that thus coercible from these utilities since 1890 may not be passed to future consumers of the gas or power, all due to Mississippi's failure to make demand therefor and in allowing these operations to continue for more than twenty years whereafter a grant would be presumed. *Caruth* v. *Gillespie*, 109 Miss. 679, 68 So. 927; *Jones* v. *Gulf Refining Co.*, 202 Miss. 705, 34 So. (2d) 735.

E. Under *Wisconsin Lumber Co.* v. *State*, 97 Miss. 571, 54 So. 247, and *Bank of Philadelphia* v. *Posey*, 130 Miss. 825, 95 So. 134, Mississippi's Court has as a rule of property established that persons may rely upon the decisions of the Supreme Court as a property right and, when and if overruled, the operation thereof is to be prospective, not retroactive. *Clanton* v. *Callender*, 198 Miss. 614, 22 So. 2nd 487, 489; *Forest Products & Mfg. Co.* v. *Buckley*, 107 Miss. 897, 66 So. 279; *New York Life Ins. Co.* v. *Nessossis*, 189 Miss. 414, 196 So. 766, 768.

Appellant's contract, protected by Article I, Sec. X of the Constitution, the Contract Clause, has been impaired by:

(1) Section 2780, *Mississippi Code of 1942*, quoted supra, as construed by the Supreme Court in this Cause, Appendix "A".

This statute, when construed by the majority opinion, took from appellant the exclusive title, possession and use conveyed, and, having revested them in the State, has authorized recovery from appellant of that expressly precedently conveyed and wherefor full compensation was paid until March 2, 1945. Compare *Gulf Refining Company* v. *Terry*, supra.

(2) The state, having by presumption as to a Sixteenth Section, authorized the conveyance in fee as aforesaid, and by the Act of 1833 (Ch. 9, Art. 12, Secs. 1 and 2, *Hutchinson's Mississippi Code*), the title, right, use, interest and occupation, supplemented by the Act of 1841 (Ch. 9, Art. 24, *Hutchinson's Mississippi Code*), could not take away the exclusive property rights of appellant as defined in *Dantzler Lbr. Co.* v. *State*, 97 Miss. 355, 53 So. 1; *Fernwood Lbr. Co.* v. *Rowley*, 110 Miss. 821, 71 So. 3; and *Mississippi Sawmill Co.* v. *Douglas*, 107 Miss. 678, 65 So. 885.

(3) The exclusive right to sue under the Act of 1841, supra, has consistently belonged elsewhere for such recovery. Compare *Lewis* v. *Myer*, 116 Miss. 454, 77 So. 297; and *Fernwood Lbr. Co.* v. *Rowley*, 110 Miss. 821, 71 So. 3.

Compare generally *Home Bldg. & Loan* v. *Blaisdell*, 290 U. S. 398, 78 L. ed. 413, where there is the fullest discussion of the contract and its impairment, but note here the state was the original grantor, and having so been is seeking to raise up in its favor, with deference, that which validly passed to Malachia Odom. As to the right so thus to do by implication as against the grantee, compare *Gulf Refining Company* v. *Terry*, supra.

Appellant, with the greatest confidence relies upon the reasoning in the *Perry Case*, and invokes the Fourteenth Amendment, there having been taken from appellant (a) exclusive possession, (b) rights existent until March 2, 1945, and (c) the imposition upon appellants of an obligation to pay for that precedently acquired.

Appellant is conscious that the Mississippi Power Company, a stranger to this litigation, did pay to Covington County a consideration for the erection of an electric line. Thereasto this appellant was in no wise a party and knew naught thereof, and when the rights of a contract are express, that done by another may not take from appellant that by the Constitution to it given. The Attorney General of the State of Mississippi has not appeared in this case up to the present time, the sole party being Covington County. Compare *Kennington-Saenger Theatres, Inc.* v. *State*, 196 Miss. 841, 18 So. (2d) 483; and *State* v. *Stewart*, 184 M. 202, 185 So. 247.

We here reassert Point II, *supra*, reading:

II. Appellant and United, public utilities as foresaid, held possession of this right of way from 1934 until date, and appellant claims under the Due Process Clause that (a) Mississippi's Supreme Court had held such occupation, under substantially similar easements to Section 2780, to be rent free (*Meridian* v. *Western Union Telegraph Co.*, 72 Miss. 910, 18 So. 84, 29 L. R. A. 770; *Village of Ridgeland* v. *Madison County*, 154 Miss. 613, 122 So. 753; and *Canton* v. *Cotton Warehouse Company*, 84 Miss. 268, 36 So. 266); and (b) the Attorney General of the State of Mississippi specifically ruled that under Section 2780 there was a right of occupancy by the utilities in return for the public service rendered and no rental was due for such use. No other agency of the State of Mississippi had ever made, generally, and especially not upon appellant or United, any such demand for such rental as has been imposed by this opinion in virtue of Section 2780, which in part provides:

> "* * * The board of supervisors of any county through which any such line may pass, shall have the power to regulate, within their respective limits, the manner in which such lines and appliances shall

> be constructed and maintained on and above the highways and bridges of the county and all such companies or associations shall be responsible in damages for any injuries caused by such construction or use thereof."

But, unexpectedly, and with deference, without due predicate therefor, Mississippi's Supreme Court in this case held March 15, 1954, that to conform to Sections 95 and 211 of Mississippi's Constitution, these utilities had to pay a reasonable rental for such user extending back substantially to 1890 when Mississippi's Constitution was adopted, and the Legislature, notwithstanding the continuous usage contra, could not create such a right of way without thereby "donating land". Since such reasonable rental was an inherent integral element of cost, these utilities had a right to pass and were obligated to pass such cost to the customers using the gas at that particular time, and would have so passed had Mississippi made due demand thereof. Mississippi cannot, by having thus deprived appellant and its warrantee, United, of this right to collect from their customers, now, beginning as at 1934 as to appellant, collect the enormous amounts that would thus appertain and whereasto appellant would be, through Mississippi's act in not demanding rental earlier, substantially wrecked in their operations and their utility functions substantially confiscated (*City of Tulsa* v. *Southwestern Bell Tel. Co.*, 75 Fed. 2d 343, collecting cases).

As to the period beginning 1934, when this pipe line was acquired and operations by appellant begun, there has been by that done by the State of Mississippi a deprivation of appellant's property without due process of law. Appellant respectfully continues to insist that its contract has been impaired and that rectification may be had, certainly until March 2, 1945, but the Legislature of the State of Mississippi is vested with complete legislative power, *Mississippi Constitution*, Section 33. Until March 15, 1954,

appellant as well as all other persons believed under Section 2780 that there was no payment due by public utilities validly serving, the viewpoint being that such utilities were essential to the public welfare for crossing public land and the state could grant rights of way for their establishment as had been done, certainly since the Congress made the land grants for railroad construction. Compare *Board of Supervisors of Covington County* v. *State Highway Commission*, 188 M. 274, 194 So. 743. Appellant believed and was led to believe by the decisions of the State of Mississippi that under Section 2780 it might pass over the public lands in virtue of the public service it was rendering. For such passage no charge whatever had been made and thereasto the Legislature was assumed to possess plenary power. Compare *Meridian* v. *Western Union Telegraph Co., supra*, decided after the Constitution of 1890 became applicable. Likewise, compare *Canton* v. *Cotton Warehouse Company*, supra, and *Village of Ridgeland* v. *Madison County*, supra.

Furthermore, the Attorney General expressly construed for the United Gas Pipe Line Company and the others as well Section 2780, *Mississippi Code of 1942*.

Now, that sought to be done by the state substantially directly is to imply under the terms of Section 2780, Mississippi Code of 1942, a right upon the part of the state to collect such sum as it may demand for "use". Such collection prior to the decision in this Cause was never made. Its imposition, with deference, was deemed an impossibility, because for more than sixty (60) years it had not been exacted. Appellant as a public utility was entitled to know in advance those elements of cost which it should collect from its customers so as to effectively serve. Compare *Richardson* v. *Midwest*, 39 Wym. 58, 270 P. 154. The state having made no demand for such use when appellant could have and would have passed this charge to its customers

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is not now to be debited under this section by the state when it may not thus so do. Compare *City of Tulsa* v. *Southwestern Telephone Co.*, 75 F. (2d) 343, 357, wherein it was said:

> "Were the Southwestern Company required to pay rental for past years here sought to be recovered, it could not include such payments in operating expenses to be considered in fixing rates for the future, and could recover no part thereof through future rates. (Citing cases)."

Compare *City of Memphis* v. *Postal Telegraph Cable Co.*, 139 Fed. 713.

Appellant is entitled to the protection (a) given by the reasoning in the *Perry Case*, and (b) given by the reasoning in the case of *Gulf Refining Company* v. *Terry*, supra, and the state thus having not demanded that which appellant could and would have passed on, may not now when appellant cannot pass it on to its customers retroactively recover, especially under the ruling of *Wisconsin Lbr. Company* v. *State*, supra, and *Bank of Philadelphia* v. *Posey*, 130 Miss. 530, 92 So. 840. We recognize that these are but state controlling and that there is no subsequent statute impairing the obligation of the contract after March 2, 1945, but when there is a change in the ruling of the Court as is here done, our submission is that there has occurred a deprivation of property. Herein, for the year 1934 the principal has been augmented by twenty years of interest at 6%. Compare *Ohio Life Ins. & Tr. Co.* v. *Debolt*, 16 How. 416, 14 L. ed. 997, where it was said, p. 1004:

> "* * * And the sound and true rule is, that if the contract, when made, was valid by the laws of the state, as then expounded by all the departments of its governments, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the Legislature of the state, or de-

> cision of its courts, altering the construction of the law."

See, also *Gelpcke* v. *City of Dubuque*, 68 U. S. 175, 1 Wall. 175. We of course are mindful of the case of *Central Land Co.* v. *Laidley*, 159 U. S. 103, 40 L. ed. 91, as to impairment of obligation, but where the state has acted as Mississippi did herein and precluded appellant from recovering that which appropriately to it belonged, our insistence is that the due process clause is available. Compare the principal announced in *Staten Island Hygeia & Cold Storage Co.* v. *United States*, 85 Fed. (2d) 58, 71:

> "* * * There is nothing in the nature of sovereignty or in the recognized prerogatives of the sovereign which would allow the government to take and keep a right without the accompanying burden that modifies it, namely, in this case, voidability for misrepresentation."

Sp. *U. S.* v. *State National Bank of Boston*, 96 U. S. 30, 24 L. ed. 647.

Hence, having had under the Constitution the right to collect the costs of doing business from customers, and having been deprived of that right by the action of the state, we claim the protection of the Fourteenth Amendment.

Visualize the customers to whom we furnished gas in 1934, and the possibility after all of these years of recovering that which under this new rule the state is making the utility pay. In short, the state not having spoken when it ought to have spoken, may not now speak when it ought to keep silent, estoppel being specifically applicable to the state. *Aetna* v. *Robertson*, 131 Miss. 343, 94 So. 7, 95 So. 137. Compare, also, *City of Jackson* v. *Merchants Bank & Tr. Co.*, 112 Miss. 537, 73 So. 573.

We reassert Point III.

III. Mississippi's title to these Sixteenth Sections came from the United States (*Hester* v. *Crisler*, 36 Miss. 681),

and not from Georgia (*Jones* v. *Madison County*, 72 Miss. 777, 18 So. 87). Compare, also, *Pilgrim* v. *Neshoba County*, 206 Miss. 703, 40 So. (2d) 598, and *Lambert* v. *State*, 211 Miss. 129, 51 So. (2d) 201.

Compare *Hester* v. *Crisler*, 36 Miss. 58, which was the law in Mississippi until the decision of *Jones* v. *Madison County*, 72 Miss. 777, wherein first *Hester* v. *Crisler* was followed and applied, but thereafter upon re-examination, so called, the rule changed so as to make Georgia and not the United States the source of Mississippi's title. Just another illustration, with deference, of the vacillation of our Court.

Appellant in its answer specifically (Tr. 26) set up the federal questions thus:

> "If complainant be allowed herein to sue, it will:
>
> "(a) Impair the obligation of the Defendant's contract, and
>
> "(b) Deprive it of its property without due process, and deny to it the equal protection of the laws, contrary to both (i) the contract clause and the Fourteenth Amendment, Federal Constitution, and (ii) similar provisions in the State Constitution."

and so did therein elsewhere.

In the Chancery Court, these federal questions were presented to the Chancellor by appellant's demurrer, which the Chancellor overruled and denied appellant's federal rights (Tr. 50).

Further, when the case was heard on its merits, these federal rights were denied by the decree in favor of Covington County and against appellant (Tr. 76). Thereupon, appeal was had to the State Supreme Court wherein under the rules of that Court the assignment of errors specifically set up:

> "If it be that said Covington County may herein sue and recover under the statutes of Missisippi, as

has been adjudged by the Chancery Court, then (a) said statutes impair the obligation of the contract of appellant, contrary to the contract clause of the federal Constitution; (b) deprive the appellant of its property without due process of law and deny to it the equal protection of the law, contrary to the Fourteenth Amendment of the Federal Constitution; and (c) take appellant's property without due process of law and in contravention of appellant's rights under the State Constitution as well."

(Tr. 82). And these questions were briefed and argued and adversely adjudged upon March 15, 1954, when the Supreme Court affirmed the Chancellor's decision (Tr. 103). Furthermore, these constitutional rights were further denied when the Suggestion of Error was overruled June 14, 1954 (Tr. 104).

WHEREFORE, it is respectfully submitted that appellant may come by appeal in virtue of contract impairment by Code Section 2780, and also by deprivation of property without due process, and thereasto have a rectification and furthermore may under the due process clause be relieved of the obligation to pay rent up to the date at which Mississippi's court changed its opinion and the course of conduct quoad utilities. Compare Section 5525, *Mississippi Code of 1942*, absolutely asserting REA.

Respectfully,

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APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

No. 38,859

(Opinion rendered March 15, 1954)

WILLMUT GAS & OIL COMPANY, ET AL.

vs.

COVINGTON COUNTY, MISSISSIPPI

ARRINGTON, Justice:

This suit was brought in the Chancery Court of Covington County, by Covington County, appellee herein, against appellants Willmut Gas and Oil Company, hereinafter referred to as Willmut, and United Gas Pipeline Company, hereinafter referred to as United, and also against other defendants who have not appealed. The purpose of the action was to cancel certain alleged clouds on the title to sixteenth section school lands asserted by the defendants, to confirm the State's title as trustee, and to recover damages against Willmut and United resulting from the construction of a natural gas pipeline across the sixteenth section, and a reasonable rental for the use of the right-of-way, and to enjoin its further use.

The parties stipulated the relevant facts. For purposes of presenting the issues involved, they may be summarized as follows: The title to the sixteenth section in question, located in Covington County, Misissippi, is vested in the State of Mississippi as trustee for the use and benefit of the schools in the township. None of it has been sold and no one has established title to this section under the twenty-five year adverse possession statute, Code Sec. 6596. On March 3, 1846, the county, through the proper authorities, leased the entire section to Malachia Odom for a term of 99 years. This lease remained in effect until March 3, 1945, its expiration date.

In 1932 Public Service Corporation of Mississippi, hereinafter referred to as Public Service, constructed an eight-inch pipeline for the transmission and distribution of natural gas as a public utility across this section. This pipeline has been used continuously until the present date as a facility of a public utility distributing natural gas. Public Service purchased right-of-way deeds from all persons who were transferees and assignees of Odom under the 99-year lease. Since 1932 natural gas has been continuously transmitted through this pipeline and is available to Municipalities in the adjoining area. From 1932 until February 20, 1934, Public Service continued to operate this gas pipeline, and appellee in this suit is not claiming any damages for Public Service's actions during this period. Public Service was adjudicated a bankrupt, and on February 20, 1934 its assets were sold to appellant, Willmut. At that time Willmut took possession of this gas pipeline across the sixteenth section in question, and used and operated it for the stated purposes until August 20, 1943, when Willmut conveyed it to United. Since that date, United has continued to use and operate it.

It was stipulated that "no trees thereon have been cut, clearing having been completed by Public Service." Neither the state nor appellee county has received any cash consideration for such right-of-way. The only consideration paid was that paid by Public Service to the persons claiming as assignees from the 99-year lessee, Odom. These persons executed right-of-way deeds to Public Service. United owns a certificate of public convenience and necessity issued by the Federal Power Commission. When the 99-year lease expired on March 3, 1945, Covington County granted agricultural leases for 15-year periods to various parties who were made defendants to this bill; none of them filed answers, and subsequently pro confesso decrees were taken against them.

It was further stipulated that solely for the purpose of this suit, the sum of $30 was a reasonable amount for the use of this sixteenth section for pipeline purposes for each year, and a proportionate amount for each fractional year, but that the board of supervisors of the county has not made

any order as to the amount of the rental. In Covington County, the pipeline crosses five of the forty-acre governmental units in this sixteenth section. None of the land is used for any purpose except for agriculture, and "the reasonable cost per annum for a right-of-way across the said land is $10 per forty, or fractional forty, if Covington County has the lawful authority to exact any cash compensation whatsoever." Public Service, Willmut, and United have each regularly paid annual ad valorem assessments on the pipeline, except where the same was exempt from taxation, which taxes have been collected by the county. When Public Service constructed the pipeline, no demand for rental was made by appellee or by the State, nor was any demand made upon Willmutt or United Until October 11, 1951, when this suit was filed. During this period, Public Service, Willmut and United have in good faith claimed a right-of-way from the state across these lands under the conveyances from assignees of the 99-year lessee, and under Miss. Code 1942, Sec. 2780, which is discussed subsequently. It was stipulated that the case could be tried on the pleadings, exhibits, and the agreed statement of facts. No testimony was taken.

The final decree confirmed the title of the State as trustee for the township schools to the sixteenth section, as against all of the defendants, subject to designated unexpired leasehold interests in the section. The decree awarded the county a judgment for $285 against Willmut for the use of the land for right-of-way purposes for a natural gas pipeline for the period from February 20, 1934 to August 20, 1943, and a judgment against United for $275 for the use of this section for the same purposes for the period from August 20, 1943 to date. The trial court further enjoined United "from in anywise using any portion of the said sixteenth section for right-of-way for the operation and maintenance" of its pipeline now located over and across these lands, and enjoined the operation and maintenance of the pipeline by United over the premises. It allowed United and Willmut an appeal with supersedeas.

Appellants contend that the chancery court erred in its final decree because Code of 1942, Sec. 2780, was a self-exe-

cuting conveyance to them and to their predecessor Public Service of a right-of-way across this sixteenth section without the requirement of any compensation; and that the consideration for which the State by Sec. 2780 made this grant of a right-of-way was that appellants made available to the State and its citizens natural gas and its accompanying benefits. Code Sec. 2780, as amended by Miss. Laws of 1950, Chap. 358, provides:

"All companies, associations of persons, municipalities, associations of municipalities, or natural gas districts, incorporated or organized for the purpose of building or constructing pipe lines and appliances for the conveying and distribution of oil or gas or for the purpose of constructing, maintaining and operating lines for transmitting electricity for lighting, heating and power purposes, are hereby empowered to exercise the right of eminent domain in the manner now provided by law, *and to build and construct the said pipe lines* and appliances *along or across* highways, waters, railroads, canals, and *public lands*, above or below grounds, but not in a manner to be dangerous to persons or property, not to interfere with the common use of such roads, waters, railroads, canals and public lands. The board of supervisors of any county through which any such line may pass, shall have the power to regulate, within their respective limits, the manner in which such lines and appliances shall be constructed and maintained on and above the highways and bridges of the county and *all such companies*, associations of persons, municipalities, associations of municipalities or natural gas districts *shall be responsible in damages for any injury caused by such construction or use thereof.*" (Emphasis added.)

This statute granted to Public Service and to appellants the right to build and construct a pipeline across "public lands". And "Public lands" includes sixteenth section school lands. Chap 11, Title 17, Vol 3 of the 1942 Code, is entitled "public lands". And Sec. 4070 in effect includes sixteenth section lands in the category of public lands. We think that the legislature in the use of the phrase "public lands" in this statute intended the same to include sixteenth section lands. Compare U. S. v. Bisel, 19 Pac. 251 (Mont.

1888); Union Pacific Ry. Co. v. Douglas Co., 31 Fed. 540 (U.S.C.C., Neb 1887); State v. Cumberland Tel & Tel. Co., 27 So. 795 (La. 1899).

The purpose which the legislature evidently had in granting to public utilities such as appellants the right to construct its pipelines across sixteenth section lands is consistent with other analogous legislative grants. Code Sec. 5525 provides that all associations and corporations formed under the Rural Electrification Act are authorized to construct Electric lines over unimproved sixteenth sections, and that this shall be without payment to the State for that easement. By Code Secs. 7723 and 7737 railroads are given the power to enter upon, acquire, and use a right-of-way across any lands belonging to the State. Code Sec. 7837 provides that all telephone and telegraph companies are authorized to erect their posts and lines across any of the public highways, streets, or waters, "and also through any of the public lands." Hodges, Tax Collector of City of Meridian v. Western Union Telegraph Company, 72 Miss. 910, 18 So. 84 (1895), held that a telegraph company could use the city streets without cash compensation being paid. City of Canton v. Canton Cotton Warehouse Company, 84 Miss. 268, 36 So. 266 (1904), applied the above cited statute to a railroad company crossing city streets. The Meridian case held that such a right is a revocable license and a mere permission to enter the streets and use them. Manifestly, in granting to public utilities the right to enter and cross public lands including sixteenth sections, the legislature, in enacting Sec. 2780, had in mind these other somewhat similar statutes dealing with other types of public utilities.

Gandy v. Public Service Corporation of Miss., 163 Miss. 187, 140 So. 687 (1932), held that appellants' predecessor in title, the appellee in that case, was such a corporation as was empowered to exercise the right of eminent domain granted it by Sec. 2780 over privately owned lands. It further held that "the plain purpose of the statute is to encourage such enterprises"; and that the supplying of gas to the public for heating and power purposes is such a public convenience as justified the granting to Public Service of the right of eminent domain. The court said that the statute as

enacted at that time erroneously omitted the conjunctive "and" before the phrase "to build and construct" and that it granted the right to condemn private property. Inferentially Gandy indicated, as we now hold, that the statute made a grant of the right to cross public lands, subject to certain restrictions. Miss. Power Co. v. Sellers, 160 Miss. 512, 133 So. 594 (1931), held that Code of 1930, Sec. 1506, being Code of 1942, sec. 2778, applied to Mississippi Power Company, and that which is presently Sec. 2780 had no application, ". . . but if it had, this record does not disclose that the board of supervisors and the power company had not lawfully discharged their duties with respect thereto, and under well-known rules we would assume that the law had been complied with, and the board of supervisors had designated and regulated the poles and the manner of erecting these poles and wires, . . ."

Hence Sec. 2780 grants to the designated public utilities a right to cross public lands, including sixteenth section. However, it also imposes certain important restrictions and limitations upon that right. The construction of the pipeline must not be in a manner dangerous to persons or property, nor such as to interfere with the common use of public lands. And the last sentence of that section provides: "The board of supervisors of any county through which any such line may pass, shall have the power to regulate, within their respective limits, the manner in which such lines and appliances shall be constructed and maintained on and above the highways and bridges of the county and all such companies, associations of persons, municipalities, associations of municipalities or natural gas districts shall be responsible in damages for any injury caused by such construction or use thereof."

The first clause of this provision gives the board of supervisors the power and the duty to regulate the manner in which the pipeline shall be constructed and maintained, and in this respect the above quoted statement from Miss. Power Company v. Sellers is relevant. The succeeding phrase, "on and above the highways and bridges of the county," does not, we think, exclude the existence of that power of the

board of supervisors as to "public lands" precedently referred to in the statute.

Permits or licenses to cross the surface, leasehold estates of the 99-year lessees were properly and necessarily acquired from those lessees. But they owned only a tenancy for years, with such right, title, and use as went with that kind of an estate. Bernard v. Board of Supervisors of Jackson County, 62 So. 2d 576 (Miss. 1953); Moss Point Lumber Company v. Board of Supervisors of Harrison County, 89 Miss. 448, 513, 42 So. 290, 296, 300 (1906). Under Sec. 2780 Public Service had the right to construct the pipeline, but that right was subject to regulation by the board of supervisors as to the manner in which it should be constructed and maintained, including its location. Public Service should first have obtained an order of the board of supervisors dealing with the manner of construction, maintenance, and the location of the pipeline. But since no claim is here made against Public Service, its failure to do that is not now in issue.

Sec. 2780 places other restrictions and limitations upon the construction and maintenance of pipelines across sixteenth section and other public lands. The company owning the same "shall be responsible in damages for any injury caused by such construction or use thereof." In other words, if in the construction of the pipeline or in its use damages are caused either to the lessee's estate or to the owner's and landlord's estate of the State as trustee, the company is responsible to the lessee or State acting through its subdivision the county for such damages. But no issue of damages in the construction of the pipeline arises here. Public Service, which built it, became bankrupt in 1934. And it is stipulated that no trees have been cut. The clearing of the right-of-way was completed by Public Service. It is further stipulated that at this time appellee is not claiming any damages for the construction of the pipeline by Public Service. Hence the issue of damages for that item is not now involved.

The last quoted clause in the statute also provides "that the company owning the pipeline shall be responsible in damages for any . . . use thereof." Miss. Constitution

1890, Sec. 211, as it existed at the time of the construction of the pipeline, and as it is now under the 1942 amendment, states that the legislature "shall provide that the Sixteenth Section lands reserved for the support of township schools shall not be sold . . ." Constitution Sec. 95 prohibits the donation of lands belonging to or under the control of the state. An uncompensated grant by the State of an easement or right-of-way across a sixteenth section would be in violation of these requirements, in Constitution Secs. 211 and 95. And we cannot assume that the legislature intended by the enactment of Sec. 2780 to violate the constitution. On the contrary, the presumption is that that body intended to comply with the organic law, and the statute should be given a reasonable interpretation which is consistent with that presumed intent and which would permit the upholding of the act. We think that the provision in Sec. 2780 that the pipeline company shall be responsible "in damages for any . . . use thereof" contemplates and means that the phrase "damage for any . . . use" includes compensation for the reasonable rental or use of a right-of-way. Compare 11 Words and Phrases (1953 Supp.), p. 11; Del Commune v. Bussen, 179 S.W. 2d 744, 748 (Mo. App. 1944); 43 Words and Phrases (1953 Supp.) p. 126. And this is the meaning of such provision irrespective of the grammatical intervention of the phrase "for any injury caused by . . ." The parties to the present suit stipulated the amount of an annual, reasonable rental for the lands. The final decree gave appellee a judgment against appellants for that stipulated rental, and that decree was in accord, we think with the provision in Sec. 2780 that appellants shall be responsible in damages for the use of the right-of-way.

Appellants rely on such cases as Washington County v. Board of Levee Commissioners, 171 Miss. 80, 156 So. 872 (1934), and Covington County v. State Highway Commission, 188 Miss. 274, 194 So. 743 (1940), which upheld the right of the State itself to impose an additional public use upon sixteenth section lands without additional compensation. Compare Crary v. State Highway Commission, 68 So. 2d 468 (1953). Although appellants are public service corporations within the meaning of that term so as to au-

thorize the legislature to grant them the right of eminent domain over private lands, since they serve a substantial public convenience, Gandy v. Public Service Corporation, supra, they are not governmental subdivisions which come within the limited rule of the Washington and Covington County cases.

Somewhat similar to the instant case is Yazoo & M.V.R.R. Co. v. Sunflower Co., 125 Miss. 92, 87 So. 417 (1921). Sunflower County sued the railroad to cancel its claim to fee title of a strip of land across a sixteenth section upon which the railroad had its right-of-way, and to recover a reasonable rental for that strip. It was held that the grant of the right-of-way to the railroad by an 1882 statute did not go into effect until the actual location of the right-of-way, and that, since this did not occur until after the 1890 Constitution went into effect, Constitution Sec. 211 prohibited a grant to the railroad of a fee simple title to the strip. When the railroad constructed its line, it obtained from the county a lease for seven years. All it could acquire was the leasehold right for that limited time, and on the date of the suit, this leasehold right had expired. The Court said that the railroad having continued in possession after expiration of its lease, it was liable to the county for "the reasonable value for the use of the right-of-way for the years subsequent to the expiration of the lease, and the chancellor's finding as to the value of the use of the right-of-way is supported by the evidence and his judgment will be affirmed." In affirming the decree allowing the county a reasonable rental for the sixteenth section right-of-way, the Court said in effect that this was necessary because of the provision of Constitution Secs. 211 and 95.

In Yazoo and M. V. R. R. v. Bolivar County, 146 Miss. 30, 111 So. 581 (1927), the county sued in equity to cancel the claim asserted by the railroad to its right-of-way over a sixteenth section, and for a writ of possession. In 1883, the board of supervisors had made an order granting appellant's predecessors a right-of-way over the school lands. The appellant in its answer pleaded that the effect of the board's order was to vest in it a 99-year leasehold estate, and that the county had the power to so lease the land in-

volved. The Court agreed substantially with appellant's position, and reversed and rendered a decree for appellant. Although the board's order did not technically constitute a lease of the right-of-way to appellant for 99 years, the Court thought that it was at least a claim of right under which appellant had possessed the land adversely for more than forty years, and that the twenty-five year adverse possessory statute applied. Hence the Court dismissed the bill, and fixed the expiration of the railroad's leasehold for its right-of-way as 1982, 99 years after its institution. In other words, the Court, in the absence of a statute such as Sec. 2780, held that the board's order was in effect a grant of a 99-year leasehold for the railroad's right-of-way.

In Summary, we hold that Sec. 2780 granted to Public Service and its successors, the appellants, a right-of-way only, being a revocable easement, over public lands, including the sixteenth section in question. However, this grant is subject to the restrictions stated in that statute, and among them is the requirement that the companies owning the pipeline, the appellants, are responsible in damages for any use of the right-of-way. That responsibility, in order to comply with Constitution Secs. 95 and 211 means that the pipeline companies must pay a consideration, either at one time or in installments of rent, for their right-of-way. In the present case the parties stipulated an annual rental up to date of the suit. The final decree was based based on that stipulation, and we affirm the decree adjudicating that appellants are indebted to appellee for such reasonable rental. In view of our interpretation of the statute, however, the decree is in error to the extent that it enjoins appellants from operating and maintaining their pipeline, and that part of the final decree is vacated. Appellee is entitled to no injunction.

We confine our decision to that necessary to be decided. We consider only the application of Sec. 2780 and Miss. Constitution Secs. 95 and 211 to a pipeline right-of-way over sixteenth section lands. We do not consider any question with reference to the application of Sec. 2780 and these constitutional sections to public lands other than school lands.

AFFIRMED AS MODIFIED.

McGehee, C.J., and Hall, Lee, Kyle, Holmes and Ethridge, Concur.

Gillespie, JJ., took no part.

ROBERDS, *Justice* (dissenting in part):

I concur in the majority opinion except that I do not think the county has any right to collect rent, or compensation, for use of the easement. Section 2780 does not, by its terms, contemplate such payment in my opinion. It imposes upon public utilities the obligation to pay "damages for any injury caused by such construction or use thereof." Only "damages" can be collected and damage is not a word applicable to liability for rent. It has reference to destruction of, or injury to, fences, houses, improvements, etc., occasioned by construction of lines by public utilities. Indeed, if annual rent is to be paid, then the easement is converted into a tenancy from year to year.

Section 95, Mississippi Constitution of 1890, prohibiting donations of public lands by the legislature, does not require money payment consideration to comply with that section. Inducement to enterprises, serving the public, to locate within this State is sufficient consideration. Hodges, City Tax Collector, v. Western Union Telegraph Co., 72 Miss. 910, 18 So. 84, 29 L. R. A. 770; City of Canton v. Canton Cotton Warehouse Co., 84 Miss. 268, 36 So. 266, 65 L. R. A. 561. Making available to the people of the State telephone, telegraph, electric power and natural gas service is a consideration more valuable than mere pittance for rent of the right-of-way, or easement. The legislature, the guardian of the public policy of the State, so considered in my opinion. At least that branch of the government thought the availability of these forces to the people, and the consequent tax revenues which such utilities have to pay the State and the various taxing subdivisions thereof, constituted sufficient consideration for grant of the power conferred by said Section 2780 and other like statutes.

An important practical question is involved here. Such a question, I realize, cannot change legal rights, but it is

proper to weigh results in trying to determine the intent of the legislature and the effect of its enactments. That question is this: The result of this decision, in my view, will create chaos and utter confusion in this State. All of these utilities acted upon Section 2780 and like statutes in construction of railroads, telegraph, telephone and power lines and in the laying of gas and oil lines. None of the statutes expressly require payment of rent to the State for an easement over public lands. Indeed, Section 5525, Mississippi Code 1942, conferring power upon REA to construct electric power lines across public lands, expressly provides this may be done "without payment to the State for said easement." The other statutes, in effect, do the same thing by not expressly requiring money payment for such right. No utility paid such money rent. The records disclose that the State now owns approximately 710,000 acres of school and lieu lands and 950,000 acres of other public lands, a total of over one and a half million acres of public lands. When many of the utility lines were constructed the State owned considerably more than the stated amount of non-school lands. These public service lines, both above and under ground, now traverse these public lands in thousands of instances. A number of the municipalities of the State, such as Natchez and Columbus, for illustration, are located upon sixteenth section lands. The utility lines are constructed on the streets and across parks throughout these municipalities. If appellant must pay annual rent in the case at bar, it is not seen why such rent cannot be collected from all of these utilities for easements over public lands back to 1890. Suits to do just that will be innumerable, unless the legislature has the power, and exercises it, to prevent such suits from being prosecuted.

APPENDIX A-1

MISSISSIPPI CONSTITUTION

SECTION 95. Lands belonging to, or under the control of the state, shall never be donated directly or indirectly, to private corporations or individuals, or to railroad com-

panies. Nor shall such land be sold to corporations or associations for a less price than that for which it is subject to sale to individuals. This, however, shall not prevent the legislature from granting a right of way, not exceeding one hundred feet in width, as a mere easement, to railroads across state land, and the legislature shall never dispose of the land covered by said right of way so long as such easement exists.

Section 211. The Legislature shall enact such laws as may be necessary to ascertain the true condition of the title to the Sixteenth Section lands in this state, or lands granted in lieu thereof, in the Choctaw Purchase, and shall provide that the Sixteenth Section lands reserved for the support of township schools shall not be sold nor shall they be leased for a longer term than ten years for lands situated outside municipalities and for lands situated within municipalities for a longer term than 99 years, for a gross sum; provided further that existing leases of the sixteenth Section lands situated in the municipalities of the state may, for a gross sum, be extended for a term of years not exceeding 99 years from the date of such extension, but the Legislature may provide for the lease of any of said lands for a term not exceeding twenty-five years for a ground rental, payable annually, and in the case of uncleared lands may lease them for such short terms as may be deemed proper in consideration of the improvement thereof, with right thereafter to lease for a term or to hold on payment of ground rent; provided, however that land granted in lieu of Sixteenth Section Lands in this state and situated outside of the county holding or owning same, may be sold and the proceeds from such sale may be invested in a manner to be prescribed by the Legislature.

Sources: 1944, Ch. 343.

APPENDIX B

Monday, March 15th, 1954 Court Sitting:

38,859

WILLMUT GAS & OIL COMPANY, ET AL.

vs.

COVINGTON COUNTY, MISSISSIPPI.

This cause having been submitted at a former term of this court on the record herein from the Chancery Court of Covington County and this court having sufficiently examined and considered the same and being of the opinion that there is partial error therein doth order and adjudge and decree that the decree of said Chancery Court rendered in this cause on the 20th day of October 1952—be and the same is hereby affirmed in all respects save as to that part of the decree to the extent that it enjoins appellants from operating and maintaining their pipe line in, over and across the lands in controversy, and that part of said decree is error, the injunction dissolved, and that part of the decree is here vacated. It is further ordered and adjudged and decreed that the appellants do have and recover of and from the appellee all of the costs of this appeal to be taxed, etc.

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APPENDIX C

Monday, June 14th, 1954, Court Sitting:

38,859

WILLMUT GAS & OIL COMPANY, ET AL.

vs.

COVINGTON COUNTY, MISSISSIPPI.

This cause this day came on to be heard on the suggestion of error filed herein and this court having sufficiently examined and considered the same and being of the opinion

that the same should be overruled doth order and adjudge that said suggestion of error be and the same is hereby overruled.

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APPENDIX D

Ch. 42, Art. 1, Section 32, *Hutchinson's Mississippi Code:*

"32. Effect of words Grant, Bargain, Sell—in a Deed. In all deeds or conveyances, whereby any estate of inheritance in fee simple, shall hereafter be limited to the grantee and his heirs, the words grant, bargain, sell, shall be adjudged an express covenant to the grantee, his heirs and assigns, to wit: That the grantor was seized of an indefeasible estate in fee simple, freed from incumbrances done or suffered from the grantor (except the rents and services that may be reserved), as also for quiet enjoyment against the grantor, his heirs and assigns, unless limited by express words contained in such deed, and that the grantee, his heirs, executors, administrators, and assigns, may, in any action, assign breaches, as if such covenants were expressly inserted: Provided, always, That this shall not extend to leases at rack rent, or to leases not exceeding one-and-twenty years, where the actual possession goes with the lease."